

## Fact Pattern I (Questions 1 and 2)

ICW Development Co. is constructing a water treatment facility on a bayou outside of New Orleans, Louisiana. As part of the project, the company must dredge one of the lagoons of the bayou in order to provide access by water to one part of the plant. The dredging operation will involve deepening the lagoon by digging up and removing silt from the bottom of the lagoon. There are specialized machines, called dredgers, designed expressly for this purpose. As the company anticipates that periodically it will have to repeat the dredging, the company decides to purchase a dredger rather than rent one.

The chief financial officer (“CFO”) of ICW contacts Lujan Inc., a company in Galveston, Texas, that buys and sells new and used industrial machinery. The CFO asks whether Lujan has any used dredgers available and the representative from Lujan says just one. The next day the operations manager for ICW flies to Galveston to inspect the dredger. The manager is an engineer and familiar with many kinds of industrial machines, but he has no specialized knowledge of dredgers. He inspects the dredger, decides it is in good working condition, and pursuant to authorization signs a sales contract to purchase the machine for \$80,000. ICW pays \$80,000 in cash. The Lujan salesperson who closed the deal with ICW was paid a commission of \$1,500 by Lujan a week after the sales contract was signed; pursuant to the salesperson’s employment contract, this commission is not refundable even if ICW returns the dredger.

A month later, when the dredger is delivered to the water treatment plant, ICW makes an unhappy discovery. It turns out that there are two kinds of dredgers: one kind is designed to dig narrow but deep trenches, suitable for laying underwater cables or pipes; the other kind is designed to dig wide but shallow trenches, suitable for improving access to waterways. To deepen the lagoon, ICW needs this latter kind of dredger, the kind that digs wide but shallow trenches. Unfortunately, the dredger it bought (a model HP 200) is of the first kind, the kind that digs deep, narrow trenches. Moreover, it is not possible to refit one kind of dredger to do the other kind of work.

It is undisputed that ICW had no idea that there were two kinds of dredgers. It is equally undisputed that, while Lujan was aware that there are two kinds of dredgers, and that this would be the first dredger purchased by ICW, it had no actual knowledge of how ICW would be using the dredger. The subject was never discussed. Experts in the matter of dredgers will testify that both kinds of dredgers are common, but that perhaps 35% of all dredgers sold are of the kind that dig narrow, deep trenches.

The sales contract contains, among others, the following provision:

**8. Warranties.** The Seller warrants that the HP 200 Dredger is free from all defects. This warranty is limited to a period of 30 days after purchase. No other warranties, express or implied, are made by the Seller. In the event of a defect, Buyer’s remedy is limited to a) repair of the defect; or b) return of the Dredger for a full refund, at Seller’s option.

ICW contacted Lujan and informed it that the dredger was “unsuitable.” ICW wished to return the dredger for a full refund. When Lujan realized that the dredger’s unsuitability was due to ICW’s need to have a shallow-but-wide-trench dredger instead of the narrow-but-deep HP 200 dredger, it refused to give any refund, but said that if ICW returned the dredger (shipping paid by ICW) Lujan would resell the dredger for ICW’s benefit, minus a 10% commission on the sales price. Lujan also said that, based on its experience, it believed that it would be able to resell the dredger for approximately its original purchase price within 90 days.

The cost of shipping the machine from Galveston to New Orleans, and vice versa, is \$3,000. ICW paid for the shipping from Galveston to New Orleans in addition to the purchase price of the machine.

ICW, upset that Lujan will not refund the purchase price and not wanting to incur the additional shipping expense, refuses to return the dredger. It places an ad in the Galveston papers and sells the machine for \$60,000. ICW then sues Lujan for \$23,000. The complaint contains two counts: Count I alleges that Lujan breached the contract by selling ICW a machine unsuitable for ICW’s purposes and then, since the machine could not be “repaired,” refusing to refund the purchase price; Count II alleges that the contract should be rescinded and ICW returned to its original position on the basis of nondisclosure and/or mistake.

**For each Question, the WORD LIMIT is 800; PAGE LIMIT is six (6) (every other line).**

**Question 1. What is the likelihood that ICW will prevail on the argument in Count II that the contract should be rescinded?**

**20%: recommended time - 45 mins.**

**Question 2. Lujan denies the allegations in ICW’s complaint. Also, as an affirmative defense, Lujan alleges that ICW failed to mitigate when it refused to return the dredger and allow Lujan to resell it. Assuming a court found Lujan in breach of contract, what is the likelihood that this affirmative defense would be accepted by a court and, if so, what would its effect be?**

**15%: recommended time - 30 min**


## Fact Pattern II (Questions 3 and 4)

A company by the name of Nine Lives manufactures bullet-proof vests using a new material called "Steeelonite." Steelonite is advertised as the strongest man-made fiber available, stronger even than Kevlar which is the material that most bullet-proof vests are made of. The price of the Nine Lives Steelonite vests is the highest of any on the market, \$1,500, but as the ads claim, "if it saves your life once, it's a bargain."

Melissa Gordon is a private body-guard. Her clients include a number of high profile women celebrities such as J-Lo, The Material Girl, The Artist Formerly Known as Pink, and Paris Johnson, the heir of a restaurant fortune. She reads about the new Nine Lives vests in a trade magazine, *On Guard*, and decides to order one.

Gordon calls up the company and talks to a sales rep. She specifically asks whether Steelonite will deteriorate if it gets wet or if it is exposed to heat. The sales rep assures her that Steelonite has been extensively tested under a variety of conditions and has passed all such tests with flying colors.

The Nine Lives ad in the *On Guard* magazine included an order form, which Gordon fills out and faxes to the company. The completed form is reproduced below:

**Nine Lives Bullet-Proof Vests**  
Our bullet-proof vests are made of a  
revolutionary material—  
Steeelonite  If it saves your life once, it's a bargain!

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Send me [ *I* ] Steelonite Vest at \$1,500.00 @

Name: ***Melissa Gordon***

Address: ***101 Stanton Ave.***

***New York, NY 10001***

Credit card number: ***4434-9911-6553***

Signature: ***Melissa Gordon***

Mail or fax coupon with payment to

Nine Lives, Inc.  
33 Catnip Lane  
Cleveland, OH

You will be billed for \$1,500.00 per vest plus \$12.95 shipping.  
This is the complete and exclusive contract between the parties.

Shortly after ordering the new vest, Gordon was featured in an article in *People* magazine. The publicity from that article resulted in an immediate spike in inquiries seeking Gordon's services. For the next month, she was able to double the number of jobs she usually had. Prior to the article, she averaged \$5,000 a month worth of contracts; within two days of the article she was booked for \$10,000 worth of contracts over the next month.

The week after the article came out, Gordon wore her new vest to a job protecting Paris Johnson on a weekend sailing cruise. Saturday evening a dispute between her client and another woman escalated into a shoving match and, in trying to break it up, Gordon ended up getting pushed off the yacht. She was soon fished out of the water and seemed unhurt, albeit drenched.

A week later, while guarding another client attending Mardi Gras in New Orleans, Gordon foiled a kidnapping attempt. In the process, she was shot and the bullet penetrated her Steelonite vest. It entered her chest and passed through her lung before exiting out her back. Gordon survived, but she was hospitalized for four weeks and unable to work for a year after that.

It turns out that Steelonite rapidly degrades after being soaked in water. Gordon sues Nine Lives. Her complaint has three counts: Count I alleges Nine Lives negligently tested and designed the vest; Count II alleges Nine Lives breached the implied warranty of merchantability; and Count III alleges Nine Lives breached an express warranty that Steelonite would not deteriorate when wet. The factual allegations of Count III reflect the facts given in paragraph 3 above.

**For each Question, the WORD LIMIT is 800; PAGE LIMIT is six (6) (every other line).**

**Question 3. Nine Lives moves to dismiss Count III for failure to state a claim upon which relief may be granted. How should the judge rule?**

**20%: recommended time - 45 mins.**

**Question 4. Assume the case goes forward on Count II only. Assess the types and amounts of damages she might be able to recover, and the likelihood of any such recovery.**

**15%: recommended time - 30 mins.**

### Fact Pattern III (Question 5)

Laone White is a wealthy woman. However, you would not know this by looking at her. She is in her seventies and wears mismatched, raggedy clothes. She is something of a recluse, rarely seen by her neighbors except for her weekly forays to the grocery store. She has lived for many years in a large but run-down Victorian house. The neighborhood was a fashionable one fifty years ago, but then fell into decline. Many of the other large Victorian homes were torn down and replaced by apartment buildings. Only in the last few years has the area begun to see some “gentrification.” One instance of this occurred in the home next to Ms. White’s. This home was bought and restored by a young professional couple, Tom Kepler and his wife, Tiffany Andrews. Tom is a stockbroker and Tiffany is an accountant.

One Saturday afternoon in the spring of 2000, Tiffany sees Ms. White in her overgrown backyard and strikes up a conversation with her. The two of them find that, despite their differences, they share a mutual love of roses. Ms. White bemoans the sorry state of her rose garden and tells her new friend that, once upon a time, her roses were known throughout the city for their beauty.

That night Tiffany conveys this story to Tom and they decide to do a favor for their sad little old neighbor. Over the next few weekends, Tom and Tiff (with Ms. White’s tearful permission) oversee the resurrection of the rose garden. The two hire Jim Border, a landscape architect, who researches archival sources for information on the White rose garden. (“Boy,” he tells them at one point, “that family was once the richest one in town. Where do you think the money went?”)

Tom and Tiff then bring in a crew to dig up the garden, saving several heirloom bushes and removing those of either little value or too far gone to save. Border lays out a new rose garden, with Tom and Tiff buying the new bushes. At the end of their project, they lead Laone outside, blindfolded, and when they remove the blindfold Laone bursts into tears. “It’s just like when I was a girl!” she says.

Three days later, Laone knocks on her neighbors’ door. She has a thin package in her hands wrapped in brown paper. Tiff invites her in for a cup of tea. Once settled in her seat, Laone announces “I know you did the roses as a kindness, but you know, I’m not as bad off as I seem. My father always said I was tight with a dime, and it’s true. I want to do something nice in return for you; I want you to have this.” She hands Tiff the package; when Tiff opens it she sees a small but exquisite oil painting, a still life of roses. Tiff is sincerely effusive in her thanks and in her delight at the painting.

A few months later in the summer of 2000, Tom and Tiff are hosting a dinner party at their home. One of their guests is the director of the state Arts Council and during the evening he notices the painting of the roses, which Tiff hung in the living room. He examines it closely and then tells his hosts that they have an original “Skipper White.” He explains that Skipper White was a prominent regional artist whose works have continued to appreciate after his death. Tiff then tells him the story of Laone White and he remarks that he is not surprised, as Laone White

was Skipper's niece. After some discrete questioning by his hosts, he ventures that the little painting is probably worth \$8,000 to \$10,000. Needless to say, his hosts are both amazed and aghast: amazed at the painting's value, and aghast that they had accepted such a valuable gift from their neighbor. "She probably has no idea," they told one another. After much soul searching, they decided it would be too demeaning to her kindness to try to return the gift.

In the fall of 2000, Laone dropped by with a suggestion. The rose garden is so delightful, she tells her young friends, that she's decided to restore all the gardens around the house, and she wants her friends to help her. "Now I don't expect you to pay for all this," she tells them, "but I don't like dealing with strangers and you two are so...competent." Still feeling guilty about the painting, Tom and Tiff agree. After Laone leaves, they agree that they'll put up \$10,000, the value of the painting, toward Laone's new project. Besides, they assure each other, sprucing up the exterior of the house next door will only increase their own home's value.

Over the winter, Laone meets with her friends to plan the restoration. Tom and Tiff then meet with Border, who is thrilled to have such a potentially high profile project to work on. In the spring of 2001, work begins in earnest. All the old, straggly shrubs are removed, dying trees are removed, overgrown flower beds dug up, weed-choked lawns ripped out.

One day, Tom and Tiff go next door to see how things are going. Laone is happily telling them how the place used to look, when Tom gently interrupts her to say, "I'm not sure we can afford all that, Laone." "You're not paying for it," Laone replies. "You just bring me the bills and I'll take care of them." Later, Tom and Tiff confide in Jim Border, telling him that Laone insists that she's paying for the renovation but they fear she doesn't appreciate what the renovation costs will be and that she can't afford it. "She has no idea," they say again. "Tell you what," says Jim. And he volunteers to do a lot of the work for free, because he feels he has a chance to win a prestigious landscape award for such a significant restoration.

The restoration proceeds and Laone is thrilled. The high point comes in June, when all the roses bloom. In July, Laone dies in her sleep. After Laone's death, Tom and Tiff learn that their little old neighbor had assets worth over \$6 million.

Tom and Tiff spent \$10,000 out of pocket for the purchase of plants and supplies. The time Jim Border spent on the project (which does win the prestigious award and, due to the "human interest" story behind the restoration, gets widespread press coverage) at his hourly rates was worth \$15,000. Tom and Tiff had paid him a retainer of \$2,000 at the beginning of the project; Jim never billed them for the other \$13,000.

**For Question 5, the WORD LIMIT is 1400; PAGE LIMIT is twelve (12) (every other line).**

**Question 5. Tom and Tiffany come to you for advice. Can they put in a claim for \$12,000 against the estate? (Recall that, if there is an enforceable agreement, then the executor of the estate is bound to pay it, but that the executor is statutorily obligated to challenge any questionable claim.) What about Jim Border, can he claim another \$13,000? Evaluate their likelihood of prevailing.**

**30%: recommended time - 1 hr. 15 mins.**

